Supreme Court, U.S.
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In The Supreme Court of the United States

MICHELLE DEULEY, et al.,

Petitioners,

vs.

DYNCORP INTERNATIONAL, INCORPORATED, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Delaware

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does United Arab Emirates law allow an employer to eliminate a third party's prospective tort liability to an employee by purchasing an additional death and dismemberment insurance policy on behalf of the employee in exchange for release of "any claims?"

2. Under the Supremacy Clause and the Seventh Amendment, when a party raises an issue of foreign law in support of a request for dispositive relief, must the court conduct a factual inquiry into the content and interpretation of that foreign law, and find facts in support of that party's argument, before ordering dispositive relief?

PARTIES TO THE PROCEEDING

Petitioners are Michelle Deuley, individually and in her capacity as Executrix of John Deuley, deceased; Kathy Gibson, individually and in her capacity as Executrix of the Estate of Gerald Gibson, deceased; and Joseph and Kim Dickinson, husband and wife.

Respondents are DynCorp International, Inc., a Delaware Corporation; DynCorp International, LLC, a Delaware Limited Liability Corporation; and CSC Applied Technologies LLC, a Delaware Limited Liability Corporation.

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OPINIONS BELOW

The Delaware Supreme Court's opinion (App. 1) is published at 8 A.3d 1156 (Del. 2010). The Delaware Superior Court's opinion (App. 21) and the related *Parlin* opinion by the Delaware Superior Court (App. 39) are both unpublished.

BASIS FOR JURISDICTION IN THIS COURT

The Delaware Supreme Court filed its opinion in this case on December 8, 2010, dismissing all of Plaintiffs' claims against all Defendants based upon an interpretation of Dubai and United Arab Emirates law. This Court has jurisdiction under 28 U.S.C. § 1257 because the Delaware Supreme Court's interpretation of foreign law implicates the Supremacy Clause and foreign affairs. Probable jurisdiction to review State court judgments implicating foreign law may exist, *see Zschernig v. Miller*, 389 U.S. 429, 431 (1968), but such jurisdiction is only raised in the alternative and Petitioners here proceed by Writ of Certiorari in light of unresolved "contrasting theories of field and conflict preemption evident in the *Zschernig* opinions." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Delaware Supreme Court rendered an opinion interpreting foreign law and dismissed Plaintiffs' claims. Article IV, Clause 2 of the United States Constitution reads:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Amendment VII of the United States Constitution reads:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Plaintiffs' decedents John Deuley and Gerald Gibson and Plaintiff Joseph Dickinson are former civilian police officers who were killed or injured at a facility in Afghanistan controlled by the Defendants

in an improvised explosive device attack while performing their employment duties for a civilian contractor in support of the United States Department of State Civilian Police ("CIVPOL") mission. Their employer, a subcontractor to the CIVPOL mission, is not a party to this action. The Plaintiffs and their spouses asserted claims of wrongful death, survival, personal injury, and loss of consortium against Defendants, the general contractors to the CIVPOL mission, regarding the housing, logistical support, protection, and supervision the Plaintiffs received. As a part of those allegations, Plaintiffs allege that the Defendants received a warning from the International Security Assistance Force ("ISAF") that an improvised explosive device attack was expected on coalition targets in Kabul within 48 hours, but the Defendants prohibited Plaintiffs from taking defensive action. Within 24 hours of the ISAF warning, the Plaintiffs were attacked.

On August 22, 2006, Plaintiffs filed their Complaint in the Superior Court of New Castle County in the State of Delaware ("Superior Court"), a state trial court of general jurisdiction. On September 27, 2006, Defendants filed a notice of removal in the United States District Court for the District of Delaware. The District Court granted Plaintiffs' motion for remand. Following remand, on February 13, 2009, Defendants filed with the Superior Court a motion to dismiss.

On February 26, 2010, the Superior Court granted Defendants' motion to dismiss. As discussed by that opinion (App. 21-38), the Superior Court relied heavily

upon its prior order in the *Parlin v. DynCorp International, Inc., et al.* case. (App. 39-58). Although *Parlin* involves substantially different facts – *e.g.*, the decedent in *Parlin* died in a separate incident in Iraq and it is disputed whether or not he was performing employment duties at the time of his death – *Parlin* involved an Employment Agreement that is, for all relevant purposes, identical to the Employment Agreements at issue here.

On December 8, 2010, the Delaware Supreme Court affirmed the Superior Court's order granting Defendants' motion to dismiss. (App. 1-20). In sum, the Delaware Supreme Court held that the Employment Agreement entered into between the Plaintiffs and the subcontractor to the CIVPOL mission released any claims that plaintiffs could have against the defendants, the general contractors to the CIVPOL mission. (App. 1, 9-15).

The Delaware Supreme Court's opinion was based on two sections of Plaintiffs' Employment Agreements. First, the "Governing Law" provision which provided: "This contract shall be governed by and interpreted under the laws of the Dubai Internet City in the Dubai Technology, Electronic Commerce and Media City Free Zone." (App. 4). Second, the "Liability" provision, which provided:

> The Employee understands and accepts the fact that he or she may be exposed to dangers due to the nature of the mission. The Employee agrees that neither Employer nor its affiliates will be liable in the event of

> death, injury, or disability, to Employee, except as stated below. Employer will obtain the insurance described in Attachment A on behalf of the Employee. The Employee agrees to accept these insurance benefits as full satisfaction of any claim for death, Injury, or disability against Employer and its affiliates.

(App. 4). As described below, the Delaware Supreme Court's interpretation was in error. Dubai / United Arab Emirates ("U.A.E.") law prohibits prospective waivers of tort liability, the "Liability" clause was insufficient under Dubai / U.A.E. law to release liability, and, even if enforceable at all, the "Liability" clause would only *limit*, rather than *eliminate*, Plaintiffs' relief, and Dubai / U.A.E. courts would retain the inherent power to award damages as necessary to compensate Plaintiffs.

REASONS TO GRANT THE PETITION

A state court's interpretation of foreign law implicates federal concerns. "There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, n. 25, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964)); *see Zschernig v. Miller*, 389 U.S.

429, 440-41 (1968) (holding Oregon probate statute intruded upon foreign affairs, noting "The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. . . . [E]ven in absence of a treaty, a State's policy may disturb foreign relations.").

The interpretation of Dubai and United Arab Emirates law has become increasingly important over the past generation as trade with those countries has expanded. According to the United States Department of State, "The U.A.E. is the United States' single largest export market in the Middle East and North Africa region, with $14.4 billion in exports in 2008 and more than 750 U.S. firms operating locally."[1] According to the Delaware Department of State, the majority of publicly-filed corporations are incorporated in Delaware.[2] The Delaware Supreme Court's interpretation of Dubai / U.A.E. law thus has substantial implications for United States foreign affairs and trade relations.

As described below, the Delaware Supreme Court's dismissal of Plaintiffs' case was predicated upon several erroneous interpretations of Dubai law. In addition to having a dispositive effect on Plaintiffs' case, those erroneous interpretations could significantly

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[1] <http://www.state.gov/r/pa/ei/bgn/5444.htm>

[2] <http://www.corp.delaware.gov/aboutagency.shtml>

impact trade relations with the U.A.E., and could have substantial repercussions for every contract which includes a choice of law provision identifying Dubai or U.A.E. law.

As also described below, there is a long-standing and ripe division among both state and federal courts as to the manner in which foreign law is raised, proven and accepted by the court. A recent opinion in the Seventh Circuit demonstrated the depth of this split. *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010) (discussed *infra*).

I. THIS COURT SHOULD GRANT REVIEW TO CORRECT THE DELAWARE SUPREME COURT'S ERRONEOUS INTERPRETATION OF DUBAI / U.A.E. LAW

For both federal and State courts, the interpretation and application of foreign law has always been subject to a higher standard than the interpretation of law from a sister jurisdiction within the United States. "The general federal rule is that the 'law' of a foreign country is a fact which must be proved." *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541, 543 (2d Cir. 1956) (collecting cases); *see also Zschernig v. Miller*, 389 U.S. 429, 461 (1968) (Harlan, J., concurring) ("When there is a dispute as to the content of foreign law, the court is required under the common law to treat the question as one of fact and to consider any evidence presented as to the actual administration of the foreign legal system," citing, *inter alia*, *Walton*).

In this case, the Delaware Supreme Court made several erroneous interpretations of Dubai / U.A.E. law:

A. Holding the Liability Clause did not violate Article 296 of the U.A.E. Civil Code;

B. Holding the Liability Clause's reference to "any claims" was sufficient to release prospective tort claims;

C. Holding that U.A.E. Labor Law precluded Plaintiffs from recovering any further damages against Defendants.

Each error is addressed below.

A. The Liability Clause Violated Article 296 of the U.A.E. Civil Code.

Article 296 of the U.A.E. Civil Code expressly provides: "Any condition purporting to provide exemption from liability for a harmful act shall be void." As Plaintiffs' expert Charles Laubach described, under Article 296 of the U.A.E. Civil Code, and "[i]t is black letter law in the U.A.E. that prospective waivers of liability in tort, such as the Liability Clause, are unenforceable," and thus a Court applying Dubai law would declare the Liability Clause in this case "void and without effect as regards a tort claim."

Defendants' experts avoided this issue entirely and blurred the distinction between contract law and tort law, an even more critical distinction under Dubai law than United States law, because the tort

law, in their view, governs societal relations in a manner similar to criminal law.[3] The Delaware Supreme Court ignored these arguments, erroneously asserted, without citation, that Defendants' experts had affirmed the validity of the release, and then cited a "treatise" in support of its conclusion that Article 296 did not apply. The referenced document is not a treatise, but a law firm brochure that cites no cases, statutes, or regulations.

Put simply, Article 296 of the U.A.E. Civil Code means what it says. As explained by Plaintiffs' experts, both of whom routinely practice in this field[4] if a court in Dubai / U.A.E. was faced with this clause, it would declare the purported release from tort liability void.

B. The Liability Clause Was Insufficient Under Dubai / U.A.E. Law To Release Prospective Tort Claims

As Plaintiffs' expert Samir Salloum opined,

> The words such as "waive", "discharge", "negligence", "default", "damages", "compensation" etc., are conspicuously missing in Article 10

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[3] As described by Plaintiffs' expert, "[In the U.A.E.] liability in tort, like criminal liability, is created by operation of law and not by contract. A private agreement between parties cannot modify the operation of the law."

[4] One of whom, Mr. Laubach, is licensed in Pennsylvania and the District of Columbia, and so is very familiar with our courts' interpretations of these issues.

> of the Employment Agreement, and therefore it could only be construed to mean that Mr. Samuel Parlin[5] shall accept the insurance benefits for any claim, for death, injury or disability, as long as there is no negligence and/or default attributable to the Employer and its affiliates, in a claim for workmen compensation.

Thus, Plaintiffs' expert concluded, the Liability Clause "did not discharge / waive the tort claims he himself or his legal heirs may have against the Employer and its affiliates."

The Delaware Supreme Court ignored this argument as well, summarily finding: "[Defendants' expert] explained that 'any claim' in the release would, by its plain meaning, include tort claims and contract claims." (App. 11.) Defendants' expert, however, explained nothing, but instead simply asserted, "In my opinion, the reference to 'any claim' in the Release would by its plain meaning include tort claims and contract claims."

Such analysis similarly ignored the operation of Dubai law with regard to the creation of contractual rights for non-parties to the contract. As Plaintiffs' expert argued, under Article 252 of the U.A.E. Civil

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[5] Defendants never submitted any expert reports with regard to this case, but instead relied entirely on the same reports filed in the *Parlin* matter. Plaintiffs' experts thus similarly refer only to the *Parlin* matter.

Code[6], "it is possible to transfer the benefit of a contract to a third party, but not the burden." Here, the parties to the contract were the Plaintiffs and an entity that is not a party to this case. Thus, under Article 252 of the U.A.E. Civil Code, the burden of the contract upon the Plaintiffs – assuming it was valid and applicable – would not be transferred for the benefit of the Defendants, who are not even named in the contract, much less parties to the contract.

C. Even Assuming The Liability Clause Is Enforceable, Plaintiffs Are Not Precluded From Seeking Further Relief Under Dubai / U.A.E. Law

In response to the above arguments made at the trial court level, Defendants' expert Hassan Arab raised a new argument that the purported release was valid under Article 296 because it did not *exempt* the defendants from liability but rather released them from liability in exchange for the proceeds of the additional death and dismemberment insurance policy purchased on behalf of the officers.[7]

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[6] Article 252 states that "a contract shall not impose an obligation upon a third party but may create a right in his favor."

[7] The reliability of this analysis is doubtful. As explained by Plaintiffs' expert Mr. Laubach, such an analysis is applicable only to breach of contract claims and not tort claims.

To the extent such argument is viable, the effect under Dubai / U.A.E. law would not be to cause Plaintiffs' claims to be dismissed, but, as Plaintiffs' expert described, to have the court "conduct a factual inquiry into whether the Plaintiff[s'] losses / damage had been adequately compensated." As further described by Plaintiffs' expert, "A court in Dubai / U.A.E. will not dismiss a case without a factual hearing, particularly not where the level of damages is disputed," and – even if contract principles were applied – the court "has inherent powers to amend / vary the pre-determined amount of compensation fixed by the parties, to make such compensation equal to the actual losses sustained."

The Delaware Supreme Court ignored these arguments and instead concluded that: "The laws of Delaware, the United Arab Emirates, and Dubai are similar if a worker is injured or killed during the course of his employment" (App. 9), and thereafter concluded that U.A.E. law precluded Plaintiffs' claims because their employer had paid the minimum compensation for wrongful death required by U.A.E. Labor Law regulations. Yet, *Defendants' own expert,* Omar Al Shaikh, the same expert upon whom the Delaware Supreme Court relied, *admitted* in his reports that the aforementioned U.A.E. Labor Law regulations are "applicable only to workers who are working within the territory of the [Dubai] Free Zone" – which indisputably does not cover the Plaintiffs, who worked entirely in Afghanistan. As Plaintiffs' expert further noted, U.A.E. Labor Law would

not have applied to the Plaintiffs even if they had been in Dubai, because the officers did not "[hold] a U.A.E. residence visa sponsored by the Dubai office of Dyncorp FZ."

Moreover, even if U.A.E. Labor Law did apply, as Plaintiffs' expert noted, "it has been clarified under several judgments issued by the courts in U.A.E. that the defendants/legal heirs of an employee who dies in an employment accident shall be entitled to compensation *beyond* the limit fixed under Article 147 of U.A.E. labor law, if the employment accident occurred on account of negligence, default attributable to the employer."

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY FOR LOWER COURTS HOW THE CONTENT OF FOREIGN LAW MUST BE PROVEN

Even though the weight of the precedent suggests that the party relying on foreign law for relief (here, the Defendants) must prove the content of that law like any other fact, there exists a deep split among jurists in the federal and the State courts as to how foreign law is proven, or if it need even be proven at all. *See Abdille v. Ashcroft*, 242 F.3d 477, 489 n.10 (3d Cir. 2001) ("In general, foreign law is treated as a fact that must be proven by the parties."); *cf. Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 631 (7th Cir. 2010) (Posner, J., concurring) ("[I] write separately merely to express emphatic support for, and modestly

to amplify, the court's criticism of . . . the practice of trying to establish the meaning of a law of a foreign country by testimony or affidavits of expert witnesses, usually lawyers or law professors, often from the country in question."); *cf. Bodum USA, Inc.*, 621 F.3d at 638 (Wood., J., concurring) ("I write separately to note my disagreement with the discussion of Fed. R. Civ. P. 44.1 in both the majority opinion, ante at 6-7, and in Judge Posner's concurring opinion. . . . I am unpersuaded by my colleagues' assertion that expert testimony is categorically inferior to published, English-language materials."). Delaware's own Rule of Civil Procedure 44.1 mirrors the federal counterpart, but the procedure for proving the content of foreign law is open to essentially unfettered discretion, as exemplified by the case *sub judice*. Thus, despite the importance of the interpretation of foreign law to foreign affairs and other federal concerns, State and federal courts are rudderless with regard to the method by which such foreign law is proven.

In the case *sub judice*, the Delaware Supreme Court erred by falling into the same methodological error identified by Judge Wood in *Bodum*: assuming it could analogize between foreign law in a foreign language and domestic law in English. The Delaware Supreme Court concluded that: "The laws of Delaware, the United Arab Emirates, and Dubai are similar if a worker is injured or killed during the course of his employment" (App. 9), and thereafter concluded that U.A.E. law precluded Plaintiffs' claims because their employer had paid the minimum compensation

for wrongful death required by U.A.E. Labor Law regulations. Yet, *Defendants' own expert*, the same expert upon whom the Delaware Supreme Court relied, *admitted* in his reports that the aforementioned U.A.E. Labor Law regulations are "applicable only to workers who are working within the territory of the [Dubai] Free Zone" – which indisputably does not cover the Plaintiffs, who worked entirely in Afghanistan.

The Delaware Supreme Court similarly found that "one treatise on the subject [of U.A.E. tort law]" remarked that parties could avoid the express prohibition on prospective waivers of tort liability by "limiting" compensation. (App. 11.) The referenced document is not a treatise, but a law firm brochure that cites no cases, statutes, or regulations – much less address the numerous arguments raised by Plaintiffs' experts explaining how U.A.E. and Dubai law functioned, how these types of releases were *prima facie* unenforceable, how no Court in Dubai or the U.A.E. had ever enforced them, and how, even if they were enforceable, would not overrule the Dubai court's inherent power to assess and to award damages in tort, regardless of contractual agreements.

These errors could have been avoided if the Delaware Supreme Court had developed an adequate factual record on the meaning and content of foreign law. The parties were permitted to submit expert reports, but no testimony was taken from the experts, the experts were not exposed to cross-examination, and the Delaware Supreme Court (and the lower Superior Court) made no inquiries for the experts

about the meaning and interpretation of Dubai / U.A.E. law. Such cursory review resulted in the many errors contained throughout the Delaware Supreme Court's review of Dubai law, such as the dispositive weight it gave to U.A.E. Labor Law regulations that all experts agreed were not applicable to the case.

The Delaware Supreme Court's failure to conduct a full inquiry not only implicated federal interests, by interpreting foreign law, but also implicated Plaintiffs' Seventh Amendment rights by summarily dismissing their claims on the basis of foreign law that was not proven. Though the Seventh Amendment's right to jury trial is not always applicable to actions filed in state court, the right does extent to the resolution of federal issues in state court, including the determination of foreign law *sub judice*. *See Dice v. Akron, C. & Y. R.R. Co.*, 342 U.S. 359, 363 (1952) (Seventh Amendment right to jury trial applicable to Federal Employers Liability Act cases in state court).

As noted by Justice Harlan's concurrence in *Zschernig*, at common law the interpretation of foreign law was a "fact" to be proven. *Accord Abdille*, *supra*. The "rule of the common law" identified by the Seventh Amendment included a demurrer, but "a demurrer to the evidence . . . admits the truth of every *fact* that has been alleged," thus including the "fact" of foreign law. William Blackstone, Commentaries,

3:370-385 (1768) (emphasis added).[8] The demurrer itself is permissible only to the extent it does not encroach upon the Seventh Amendment's requirement "that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them." *Galloway v. United States*, 319 U.S. 372, 396 (1943). The cursory review by the Delaware Supreme Court of the "fact" of Dubai / U.A.E. law trespassed on that fundamental right.

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[8] *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339-347 (1979) (Rehnquist, J., dissenting) ("[N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment").

CONCLUSION

For the foregoing reasons, Petitioners urge that this Petition be granted.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF DELAWARE

MICHELLE DEULEY, Individually, and in Her Capacities as Surviving Spouse of John Deuley, as Executrix of the Estate of John Deuley, Deceased, And as Mother, Guardian and/or Next Friend of Amberlye Marie Deuley, Justin Andrew Deuley, and Jordan Aubrey Deuley, Minor Children of John Deuley, JOSEPH AND KIM DICKINSON; KATHY GIBSON, Individually, and in her Capacities as Surviving Spouse of Gerald Gibson and as Executrix of the Estate of Gerald Gibson, Deceased, Plaintiffs Below Appellants, v. DYNCORP INTERNATONAL, INCORPORATED, a Delaware Corporation Parent of the co-defendant DYNCORP Entities, formerly known as DI Acquisition Corp; DYNCORP INTERNATIONAL LLC, a Delaware Limited Liability Corporation; and CSC APPLIED TECHNOLOGIES LLC, Formerly known as Dyncorp Technical Services, LLC, a Delaware Limited Liability Corporation, Defendants Below Appellees.	No. 155, 2010 Court Below: Superior Court of the State of Delaware in and for New Castle County C.A. No. 06C-08-188

Submitted: September 15, 2010
Decided: December 8, 2010

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

Upon appeal from the Superior Court. **AFFIRMED**.

Neilli Mullen Walsh and Ben T. Castle of Young Conaway Stargatt & Taylor LLP, Wilmington, Delaware; James E. Beasley, Jr. and Maxwell S. Kennerly (argued) of The Beasley Firm, LLC, *of counsel*, Philadelphia, Pennsylvania for appellants.

Robert K. Beste, III of Smith, Katzenstein & Furlow LLP, Wilmington, Delaware; Robert B. Wallace (argued), Kevin Farrell and Chrissy Costantino of Wilson, Elser, Moskowitz, Edelman & Dicker LLP *of counsel*, Washington, DC for appellees.

STEELE, Chief Justice:

In this appeal we consider whether a Superior Court judge erred by holding that under Delaware law the liability clause in civilian police officers' employment contracts released claims arising out of injuries suffered in Afghanistan. The complainants contend that the liability clause and relevant language purporting to release "any claim" is insufficient to release their employer and its affiliates from claims of negligence. Because the language of the employment agreement clearly and unambiguously releases those claims, we **AFFIRM** the Superior Court's judgments.

FACTUAL AND PROCEDURAL BACKGROUND

On August 29, 2004, a terrorist attack on the United States Department of State Civilian Police (CIVPOL) headquarters building in Kabul, Afghanistan, killed CIVPOL officers John Deuley and Gerald Gibson and seriously injured Joseph Dickinson. The terrorist operative detonated a vehicle borne improvised explosive device on the street outside the building. Deuley's wife and Gibson's wife filed wrongful death and survival actions, Dickinson filed a personal injury claim, and his wife filed a loss of consortium claim against the general contractors of the mission.

The Officers worked for DynCorp International FZ, LLC, a Dubai corporation. DynCorp, FZ is not a party to this action.[1] Appellees/Defendants DynCorp International Inc., DynCorp International LLC, and CSC Applied Technologies LLC (collectively, DynCorp) were the general contractors to the CIVPOL mission. They managed employee housing, logistical support, and supervision. DynCorp International, Inc. is a Delaware corporation with its principal place of business in Reston, Virginia. DynCorp International LLC is a limited liability Delaware company with its

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[1] Pursuant to 42 U.S.C. § 1651(a)(4), the Defense Base Act, which applies Section 904(a) of the Longshore and Harbor Workers' Compensation Act to any employment under a contract (or subcontract with respect to such contract) entered into by the United States for engaging in public works abroad, subcontractor employer FZ-LLC Dubai secured DBA coverage for its employees, John Deuley, Joseph Dickinson, and Gerald Gibson.

principal place of business in Fort Worth, Texas. CSC Applied Technologies LLC is a Delaware limited liability company that maintains an office in New Castle, Delaware.

DynCorp filed a motion to dismiss pursuant to Superior Court Rule 12(b)(6) based on the terms of the Employment Agreement the Officers signed. The agreement contained a "Liability" provision at Paragraph 10, stating:

> The Employee understands and accepts the fact that he or she may be exposed to dangers due to the nature of the mission. The Employee agrees that neither Employer nor its affiliates will be liable in the event of death, injury, or disability, to Employee, except as stated below. Employer will obtain the insurance described in Attachment A on behalf of the Employee. The Employee agrees to accept these insurance benefits as full satisfaction of any claim for death, injury, or disability against Employer and its affiliates.[2]

The agreement also contained a choice of law provision stating "[t]his contract shall be governed by and interpreted under the laws of the Dubai Internet City in the Dubai Technology, Electronic Commerce and Media City Free Zone."[3] Both parties submitted expert testimony attempting to demonstrate the

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[2] Appellants' Appendix at A000077, A000083, A000090.

[3] Appellants' Appendix at A000079, A000086, A0000902.

applicable Dubai law in support of and against the Motion to Dismiss.

In accordance with the agreement, DynCorp purchased insurance for Deuley, Gibson, and Dickinson. Upon their deaths, Deuley's and Gibson's beneficiaries received $160,000 under their policies.[4] Dickinson receives disability benefits of $1030.78 per week, and will receive free medical treatment until his doctor releases him to return to work or he reaches his maximum medical improvement.[5]

The Superior Court judge granted DynCorp's Motion to Dismiss based on the above stated contract provision.

STANDARD OF REVIEW

We review a decision to grant a Motion to Dismiss under Superior Court Rule 12(b)(6) *de novo* to determine whether the judge erred as a matter of law in formulating or applying legal precepts.[6] In reviewing the grant or denial of a Motion to Dismiss, "we view the complaint in the light most favorable to the nonmoving party, accepting as true its well-pled allegations and drawing all reasonable inferences

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[4] *Deuley v. DynCorp Int'l, Inc.*, 2010 WL 704895, at *2 (Del. Super. Ct. Feb. 26, 2010).

[5] *Id.* Dickinson's injuries include loss of hearing and impairment to his left leg.

[6] *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).

that logically flow from those allegations."[7] We do not, however, accept "conclusory allegations unsupported by specific facts, nor do we draw unreasonable inferences in the plaintiffs favor."[8] In limited circumstances a court may consider the plain terms of a document incorporated in the complaint without converting the motion into one for summary judgments.[9]

A judge's ruling on foreign law is a question of law we review *de novo*.[10]

ANALYSIS

A. The Choice of Law Analysis

Delaware courts use the "most significant relationship test" when conducting a contract choice of law analysis.[11] The Restatement (Second) Conflict of Laws Section 6(2) provides that the following seven factors are relevant in conducting a choice of law inquiry:

> (a) the needs of the interstate and international systems,

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[7] *Id.*

[8] *Id.* (citing *White v. Panic*, 783 A.2d 543, 549 (Del. 2001)).

[9] *In re Gen. Motors S'holder Litig.*, 897 A.2d 162, 169 (Del.2006); *see also In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995).

[10] *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 30 (Del. 2005).

[11] *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 41 (Del. 1991).

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

In general, Delaware Courts will honor "a contractually designed choice of law provision so long as the jurisdiction selected bears some material relationship to the transaction."[12] A material relationship exists where a party's principal place of business is located within the foreign jurisdiction,[13] a majority of the activity underlying the action occurred within the foreign jurisdiction,[14] and where parties to a contract

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[12] *J.S. Alberici Constr. Co., v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000); *Annan v. Wilmington Trust Co.*, 559 A.2d 1289, 1293 (Del. 1989).

[13] *Maloney-Refaie v. Bridge at Sch., Inc.*, 958 A.2d 871, 879 n.16 (Del. Ch. 2008); *Shadewell Grove IP, LLC v. Mrs. Fields Franchising, LLC*, 2006 WL 1375106, at *7 (Del. Ch. May 8, 2006); *Hills Stores Co. v. Bozic*, 769 A.2d 88, 112 (Del. Ch. 2000).

[14] *E.I. duPont de Nemours & Co. v. Bayer CropScience L.P.*, 958 A.2d 245, 249 n.9 (Del. Ch. 2008).

performed most of their services in the foreign state.[15] However, a foreign jurisdiction's laws may not be used to interpret a contractual provision "in a manner repugnant to the public policy of Delaware."[16]

The Officers' employment agreement plainly states that Dubai law governs the contract.[17] While Dubai arguably does not have a strong material relationship to this action – Deuley was from Arkansas, Gibson was from Missouri, Dickinson is a resident of Virginia, the DynCorp Defendants are Delaware business entities, and the Officers' employment and their injuries occurred in Afghanistan – Dubai's relationship to the case is similar to Delaware's. As we explain below, the result would be the same under both Delaware and Dubai law. Therefore "[a]ccording to conflicts of law principles . . . there is a 'false conflict,' and the Court should avoid the choice-of-law analysis altogether."[18]

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[15] *Bozic*, 769 A.2d at 112. See also *Knight v. Caremark Rx, Inc.*, 2007 WL 143099, at *5 n. 14 (Del. Ch. Jan. 12, 2007) ("Alabama clearly satisfies this test because the claims and counterclaims that the Settlement Agreement resolved were pending in its State courts.").

[16] *J.S. Alberici Constr. Co.*, 750 A.2d at 520.

[17] Appellants' Appendix at A000079, A000086, A0000902.

[18] *Berg Chilling Sys., Inc. v. Hill Corp.*, 435 F.3d 455, 462 (3d. Cir. 2006); *see also Lagrone v. Am. Mortell Corp.*, 2008 WL 4152677, at *5 (Del. Super. Ct. Sept. 4, 2008) ("In such instances of 'false conflicts' of laws, the Court may resolve the dispute without a choice between the laws of the competing jurisdictions.").

B. Dubai/UAE Law Analysis

The laws of Delaware, the United Arab Emirates,[19] and Dubai are similar if a worker is injured or killed during the course of his employment. In the UAE and Dubai, if an employee is killed or injured during the course of his employment, the law provides certain remedies. In the event of the death of an employee, UAE Labor Law requires that a certain amount be paid to the employee's family. The judge here found the release valid under UAE labor law based upon the expert declaration of Omar Al Shaikh, a Dubai attorney specializing in UAE labor law:

> [I]n order for [the general release] to be valid where an employee has died as a result of an accident at work[,] the employer is required to pay the employee's family (as defined in Article 149) a one time lump sum payment

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[19] The Dubai Internet City is a free zone in the UAE that facilitates foreign investment opportunities in the UAE. The TECOM Employment Regulations of 2004 apply to all companies that operate in Dubai and regulate the employment relationship between employer/licensee and its employees. Article 12.2 of the TECOM Employment Regulations requires that:

> "A licensee worker's compensation insurance shall include cover [sic] employment injury and/or disability and related medical expenses in accordance with the UAE Labor Law."

TECOM regulations may provide additional or enhanced requirements between employer and employee in Dubai, but the employment relationship is still governed by the UAE Labor Law which creates the statutory minimum obligations of the employer. Appellants' Appendix at A000049.

> equal to his basic remuneration for 24 months, provided that the amount of the compensation is not less that AED 18,000 (USD $4,904.63) nor greater than AED 35,000 (USD $9,536.78).[20]

UAE Labor Law enforces the waiver provision in the Officers' employment contract as long as it is "more advantageous to the worker."[21] In the instant case, the Officers' estates were paid more than the amount required under the UAE Labor Law. The statutory amount owed to Deuley's estate was approximately $134,769.12 and the insurance policy paid a lump sum payment of $160,000.[22] The statutory amount owed to Gibson's estate was approximately $106,444.80 and the insurance policy paid a lump sum payment of $160,000.[23] The statutory amount owed to Dickinson for his injuries is $60,923.07 and to date he has received $237,951.15 in benefits under the contractually mandated insurance policy.[24] He received medical treatments for injuries at no cost to him and will continue to receive a temporary partial disability payment of $1,030.78 per week.[25] The judge also found the release valid under the UAE Civil

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[20] *Id.*

[21] *Id.* at A000316.

[22] *Id.* at A000062.

[23] *Id.* at A000064.

[24] *Id.* at A000065.

[25] *Id.*

Code.[26] Expert Hassan Arab, partner in a Dubai law firm, opined that the release is valid not only under UAE labor law, but also under the Civil Code. Article 296 of the Civil Code states that "[a]ny condition purporting to provide exemption from liability for a harmful act shall be void."[27] According to one treatise on the subject, however, "it is *permissible for parties to limit compensation* to a certain amount or to a specified remedy, provided that such agreement does not violate an existing law, regulation or public policy."[28] We agree with the judge that the release did not purport to provide an exemption from liability; it merely provided the Officers the stated benefits *in lieu* of their right to sue their employer in the event of death or injury during the course of their employment.

Under Dubai law, the phrase "any claim" in this contract releases both contract and tort claims. Arab explained that "any claim" in the release would, by its plain meaning, include tort claims and contract claims.[29] He also said the contract "provides for the amount the parties have agreed shall be the compensation for [the Officers] and [their Estates] in the event of [ ] death [or injury] as long as [they are

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[26] *Parlin v. DynCorp. Int'l.*, 2009 WL 3636756 at *4 (Del. Super. Ct. Sept. 30, 2009).

[27] *Id.*

[28] Appellants' Appendix at A000160 (emphasis added).

[29] Appellants' Appendix at A000342.

employees] of DynCorp FZ."[30] Essentially, Arab said as long as the Officers' contract was in effect at the time of death or injury, then the release governs any claims in contract and tort. The Officers have put forth no arguments that the contract was not in effect at the time of the accident. In fact, the Officers or their respective estates have recognized the financial benefit of the bargain by accepting the benefits awarded under the coverage purchased in exchange for the release.[31]

C. Delaware Law Analysis

Delaware courts recognize the validity of general releases.[32] A clear and unambiguous release "will [only] be set aside where there is fraud, duress, coercion, or mutual mistake concerning the existence of a party's injuries."[33]

In determining whether the release is ambiguous, the intent of the parties is controlling as to the scope and effect of the release.[34] It must appear that

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[30] *Id.*

[31] *See supra* note 22, 23, 24.

[32] *Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 985 (Del. 1981).

[33] *Parlin*, 2009 WL 3636756 at *4 (quoting *Edge of the Woods, Ltd. P'ship v. Wilmington Sav. Fund Soc'y, FSB*, 2000 WL 305448, at *4 (Del. Super. Ct. Feb. 7, 2000).

[34] *Tucker v. Alban, Inc.*, 1999 WL 1241073, at *2 (Del. Super. Ct. Sept. 27, 1999).

the plaintiff, or a reasonable person in the place of the plaintiff, understood the terms of the release.[35] A court determines the parties' intent from the overall language of the document.[36] The Officers signed an employment agreement, which plainly stated: "[t]he Employee *understands* and *accepts* the fact that he or she will be exposed to dangers due to the nature of the mission."[37] The next sentence clearly discusses the possibility of death, injury, and disability while limiting the employer's liability to the coverage stated in the subsequent sentence.[38] Finally, in the last sentence of the liability clause, the employee agrees to accept the insurance benefits as "*full satisfaction*" of "*any claim*" for "*death, injury, or disability* against Employer and its affiliates."[39] In this short, four sentence liability clause, the Officers were told they would be exposed to dangers "due to" the nature of the mission[40] and they were told twice that death, injury, and disability were likely possibilities.

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[35] *Id.* at *2.

[36] *Id.*

[37] Appellants' Appendix at A000077, A000083, A000090 (emphasis added).

[38] *See id.*

[39] *Id.* (emphasis added).

[40] The trial judge took judicial notice that "at a minimum, when [the Officers] signed the releases, even a poorly informed American had to have appreciated that working in Afghanistan involved the general risk of insurgent or terrorist attacking by an IED. The complaint offers no reason to find that any plaintiff here was probably unaware of the general risk of being injured

(Continued on following page)

The limitation on liability provision at issue here, where the Officers agreed to accept insurance benefits in exchange for a release, is more akin to a workers' compensation relationship. If the Officers died or were injured during the course of their employment in Delaware, Delaware's Workers' Compensation Law (insurance to which an employer *must* subscribe) would have provided an exclusive remedy based upon a schedule "regardless of the question of negligence and to the exclusion of all other rights and remedies."[41] Similarly, the employment agreement here states that each Officer "agrees that neither Employer nor its affiliates will be liable in the event of death, injury, or disability" and that "[t]he Employee agrees to accept [the] insurance benefits as full satisfaction of any claim for death, injury, or disability against Employer and its affiliates."[42]

We therefore hold that the language of the employment contract is clear and unambiguous.[43] The overall language of the agreement implicates a risk shifting arrangement similar to workers' compensation arrangements. The Officers agreed to waive their right to sue their employer and affiliates

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or killed by a bomb." *Deuley v. DynCorp. Int'l.*, 2010 WL 704895, at *4 (Del. Supr. Ct. Feb. 26, 2010).

[41] 19 *Del. C.* § 2304.

[42] Appellants' Appendix at A000077, A000083, A000090.

[43] The Officers put forth no arguments of fraud, duress, coercion, or mutual mistake.

in the event of death, injury, or disability for "any claims" related to the mission.

D. Analysis of the Wrongful Death, Survival, Personal Injury and Loss of Consortium Claims

The release says: "The [Officers] understand[ ] and accept[ ] the fact that [they] may be exposed to dangers due to the nature of the mission."[44] This reference to the nature of the mission clearly contemplates a hazardous work environment and the reference to "any claim" in the release by its plain meaning applies to both contract and tort claims under both Dubai[45] and Delaware law. The Officers' employment contract was drafted with the intent to provide them with a form of workers' compensation if they were killed or injured during the course of their employment. The purpose of the Delaware Workers' Compensation Statute, as well as other similar state statutes, is a trade off. The first goal is prompt compensation to the injured worker for the job related injury without the worker being required to prove any fault.[46] Conversely, the other goal is to preclude the employee from bringing a suit for a common law tort against the employer arising out of a job related

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[44] Appellants' Appendix at A000077, A000083, A000090.

[45] *Id.* at A000342.

[46] *Rafferty v. Hartman Walsh Painting Co.*, 760 A.2d 157, 159 (Del. 2000); *see also* Larson, Worker's Compensation Law § 103.03: 103-5 through 103-6.

accident. Accordingly, "[u]nder these statutes, most courts have held that the exclusivity provision of a Workers' Compensation statute precludes a suit for negligence under the common law, even if the injury was caused by the gross, wanton, willful, deliberate, reckless, culpable or malicious negligence, or other misconduct of the employer."[47]

Similarly, under Delaware law, derivative claims are barred under the workers' compensation statute because the exclusivity provision extinguishes the predicate claim.[48]

E. Wrongful Death Claims

We hold that Deuley and Gibson waived their eligible survivors wrongful death claims by signing the release in the employment agreement. Under Delaware's wrongful death statute,[49] a wrongful death action is derivative and wholly dependent on whether

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[47] *Rafferty*, 760 A.2d at 159.

[48] *Rafferty*, 760 A.2d at 159 (holding a wrongful death action cannot be maintained when worker's compensation provides the exclusive remedy); *Lovett v. Chenney*, 2007 WL 687228, at *9 (Del. Super. Ct. Mar. 7, 2007), aff'd, 959 A.2d 28 (Del. 2008) (holding a loss of consortium claim is barred when worker's compensation provides the exclusive remedy).

[49] 10 *Del. C.* § 3724(c)

> In an action under this subchapter, damages may be awarded to the beneficiaries proportioned to the injury *resulting from the wrongful death* (emphasis added).

the decedent had a right to bring a claim during his lifetime. A Delaware wrongful death claim "has *always* been a separate and different right of action than that held by the deceased."[50] Nevertheless, in Delaware, wrongful death claims have been "held subject to the same infirmities as would have existed in a suit by the deceased if still alive."[51] The current wrongful death statute, specifically 10 *Del. C.* § 3721(5), imposes a condition precedent to the accrual of a wrongful death cause of action by the Officers – the decedent's ability to have maintained an action and recovered damages, if death had not ensued.[52]

Although we agree with the trial judge's holding we adopt different reasoning.[53] The Officers have no direct claim against DynCorp because they waived "any claim" for negligence. Because the Officers unambiguously waived their claim for negligence against DynCorp for their injuries and death, their eligible survivors' wrongful death derivative claims cannot arise from any predicate claim. Therefore, the Officers' eligible survivors are barred from pursuing

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[50] *Drake v. St. Francis Hosp.*, 560 A.2d 1059, 1062 (Del. 1989); (*quoting Milford Mem'l Hosp., Inc. v. Elliott*, 210 A.2d 858, 860 (Del. 1965)).

[51] *Drake* at 561 (quoting *Milford Mem'l*, 210 A.2d at 860).

[52] 10 *Del. C.* § 3721(5)

> "Wrongful Act" means an act, neglect or default including a felonious act *which would have entitled the party injured* to maintain an action and recover damages *if death had not ensued* (emphasis added).

[53] *Deuley*, 2010 WL 704895, at *3-*4.

wrongful death claims for failure to meet the condition precedent because the Officers waived all of their claims against DynCorp in a *pre-injury* limitation on liability agreement in return for insurance.

F. Survival Claims

Under Delaware's survival statute,[54] "[a] survival action, filed by the personal representative of the estate, recovers any damage sustained by the decedent between the injury and his/her death, for which the decedent could have recovered had [he] lived."[55] We agree with the trial judge's ruling in *Parlin* that by signing the employment agreement containing the release, the Officers waived their estates' survival claims. The agreement stated that the Officers "agree[d] to accept [the] insurance benefits as full satisfaction of any claim for death . . . against Employer and its affiliates." The Officers waiver of their right to sue DynCorp for their injuries and death,

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[54] 10 *Del. C.* § 3701

> All causes of action, except actions for defamation, malicious prosecution, or upon penal statutes, shall survive to and against the executors or administrators of the person to, or against whom, the cause of action accrued. Accordingly, all actions, so surviving, may be instituted or prosecuted by or against the executors or administrators of the person to or against whom the cause of action accrued. This section shall not affect the survivorship among the original parties to a joint cause of action.

[55] *Franz v. U.S.*, 791 F. Supp. 445, 448 (D. Del. 1992).

bars their personal representatives from pursuing the survival claim.

G. Loss of Consortium Claims

We hold Dickinson waived his wife's loss of consortium claim by signing the release in the employment agreement. We find the holding of *Jones v. Elliot*[56] distinguishable on the facts of this case. In *Jones* we held a "physically injured spouse may not unilaterally extinguish the loss of consortium claim of the other spouse by signing a general release, for the loss of consortium claim is not his to extinguish."[57] In *Jones*, we explained "that the direct claim spouse must have a right to maintain a claim for personal injuries against the alleged tortfeasor before the noninjured spouse's claim for loss of consortium may arise."[58] Thus, loss of consortium is a derivative claim. The difference between this case and *Jones* is that in *Jones* the injured spouse had a claim against the tortfeasor and released the claim after it arose without his wife's knowledge or consent. Here, Dickinson waived all of his claims against DynCorp in a *pre-injury* limitation on liability agreement in return for benefits. Dickinson has no "direct claim" against DynCorp because he waived "any claim" based on negligence and, therefore, his spouse's loss of

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[56] 551 A.2d 62 (Del. 1988).

[57] *Id.* at 64-65; *see also Parlin*, 2009 WL 3636756 at *5.

[58] *Jones*, 551 A.2d at 64.

consortium claim has no predicate claim from which to derive.

H. Personal Injury Claims

Dickinson waived his personal injury claims by signing the release in the employment agreement. Because the liability clause is valid and "any claim" includes claims of negligence against DynCorp, Dickinson's claims for personal injury are barred.

I. Assumption of the Risk

Because we affirm the decision of the trial judge on other grounds we need not discuss assumption of the risk.

CONCLUSION

For these reasons, we affirm the judgment of the Superior Court.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

MICHELLE DEULEY, Individually, and in her Capacities as Surviving Spouse of John Deuley, As Executrix of the Estate of John Deuley, Deceased, And as Mother, Guardian and/or Next Friend of Amberlye Marie Deuley, Justin Andrew Deuley, and Jordan Aubrey Deuley, Minor Children of John Deuley; JOSEPH AND KIM DICKINSON; KATHY GIBSON, Individually, and in her Capacities as Surviving Spouse of Gerald Gibson and as Executrix of the Estate of Gerald Gibson, Deceased,	)	C.A. No.: 06C-08-188 FSS **E-FILED**
Plaintiffs,	)	
v.	)	
DYNCORP INTERNATIONAL, INCORPORATED, a Delaware Corporation, Parent of the co-defendant DYNCORP entities, formerly known as DI Acquisition Corp; DYNCORP INTERNATIONAL LLC, a Delaware Limited Liability Corporation; and CSC APPLIED TECHNOLOGIES	)	

LLC, formerly known as)
Dyncorp Technical Services,)
LLC, a Delaware Limited)
Liability Corporation,)
Defendants.)

Submitted: November 17, 2009
Decided: February 26, 2010

MEMORANDUM OPINION AND ORDER

Upon Defendants' Motion to Dismiss – *GRANTED.*

SILVERMAN, J.

The facts and issues presented here are similar to those in the related case, *Parlin v. DynCorp International, Inc.*[1] In summary, *Parlin* recently held that, by signing an employment agreement containing a general release, Parlin contractually waived his estate's survival claim, but not his family's wrongful death claim. The key issue left undecided was whether, for tort purposes, the release also amounted to primary or, as it is also called, express assumption of the risk. If Plaintiffs agreed to assume the risk, Defendants have a complete defense to Plaintiffs' tort claims, and, therefore, a complete defense to their next-of-kin's wrongful death claims. Now, the court must decide if the contractual release that waived the releaser's

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[1] 2009 WL 3636756 (Del. Super. Sept. 30, 2009) (Silverman, J.).

survival claim was also an agreement to assume the risk for tort purposes.

I.

On August 29, 2004, John Deuley and Gerald Gibson were killed, and Joseph Dickinson was seriously injured, by Al Qaeda in Kabul, Afghanistan. The three men worked on a United States Department of State Civilian Police (CIVPOL) mission "to assist the Government of Afghanistan with the development of a democratic police force capable of enforcing the rule of law." Deuley, Gibson, and Dickinson were stationed at headquarters, called "DynHouse," when it was attacked by a vehicle-borne improvised explosive device. Plaintiffs describe DynHouse as "a highly symbolic target for Al Qaeda that was formerly used by Osama Bin Laden[.]"

Plaintiffs allege that Deuley and Dickinson "repeatedly warned, in writing and in person, defendants . . . of the insecure nature of DynHouse[,]" but that "[e]ach time, defendants rebuffed the recommendations and chose the less secure option, which was usually to allow DynHouse to remain insecure[.]" Plaintiffs further state:

> On August 28, 2004, the International Security Assistance Force . . . based in Kabul, which was organized by the United Nations and commanded by the North Atlantic Treaty Organization, issued a warning for an attack on coalition targets in downtown Kabul over

> the next 48 hours utilizing either a Body-Borne or Vehicle-Borne Improvised Explosive Device. Defendants received this warning[.]
>
> . . . .
>
> [D]ecedent Deuley and plaintiff Joseph Dickinson cancelled all unnecessary movements and alerted the foreign guards and all employees of the possibility of an attack.
>
> Despite the substantial certainty of an imminent attack on a symbolic coalition target lacking basic building security measures, defendants . . . still did not allow the security employees to take even minimal measures to protect DynHouse, including closing the adjacent street and/or deploying vehicle barricades.
>
> . . . .
>
> On August 29, 2004, within 24 hours of the ISAF warning, an Al Qaeda operative detonated a VBIED immediately adjacent to the entrance to DynHouse, severely injuring plaintiff Joseph Dickinson and severely injuring and killing John Deuley and Gerald Gibson.

Defendants, DynCorp International, Inc., DynCorp International LLC, and CSC Applied Technologies LLC, were the general contractors to the CIVPOL mission. Defendants managed employee housing, logistical support, and supervision. DynCorp International, Inc. is a Delaware corporation with its principal place of business in Reston, Virginia. DynCorp

International LLC is also a Delaware corporation with its principal place of business in Fort Worth, Texas. CSC Applied Technologies LLC is a Delaware limited liability corporation that maintains an office in New Castle, Delaware.

Defendants had subcontracted with non-party, DynCorp International FZ-LLC, a Dubai corporation, to hire personnel and provide services under the CIVPOL contract. DynCorp International FZ-LLC was Deuley's, Gibson's, and Dickinson's employer at the time of the Kabul explosion.

Deuley, Gibson, and Dickinson signed employment agreements with DynCorp International FZ-LLC, on February 13, 2004, June 26, 2004, and December 11, 2003, respectively, stating:

> The Employee understands and accepts the fact that he . . . may be exposed to dangers due to the nature of the mission. The Employee agrees that neither Employer nor its affiliates will be liable in the event of death, injury, or disability to Employee, except as stated below. Employer will obtain . . . insurance . . . on behalf of the Employee. The Employee agrees to accept these insurance benefits as full satisfaction of any claim for death, injury or disability against Employer and its affiliates.

The agreements also contain a choice of law provision, stating: "This contract shall be governed by and interpreted under the laws of the Dubai Internet City

in the Dubai Technology, Electronic Commerce and Media City Free Zone."

In accordance with the agreements, insurance was purchased for Deuley, Gibson, and Dickinson. Upon their deaths, Deuley's and Gibson's beneficiaries received $160,000.00 under the policies. For his injuries, which include loss of hearing and impairment to his left leg, Dickinson receives disability benefits of $1,030.78 per week, and will receive paid-for medical treatment until his doctor releases him to return to work or he reaches his maximum medical improvement.

II.

On August 22, 2006, Deuley's wife, Michelle, and Gibson's wife, Kathy, filed wrongful death[2] and survival[3] actions against Defendants. Additionally, Dickinson filed a personal injury claim, and his wife, Kim, sued for "loss of her husband's society, comfort, companionship, and consortium." Plaintiffs joined in one action under Superior Court Civil Rule 20.[4]

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[2] *10 Del. C.* §§ 3721-22, 3724-25.

[3] *10 Del. C.* §§ 3701, 3704.

[4] *See* Super. Ct. Civ. R. 20(a) ("All persons may join in one action as plaintiffs if they assert any right to relief . . . arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.").

On September 27, 2006, Defendants filed a notice of removal in the United States District Court for the District of Delaware. The District Court subsequently granted Plaintiffs' motion for remand, and the case returned to this court.[5] On February 13, 2009, Defendants filed a motion to dismiss under Superior Court Civil Rule 12(b)(6).[6]

III.

A case may be dismissed, under Rule 12(b)(6), for failure to state a claim upon which relief can be granted. The court must accept all well-pleaded allegations as true, and "[t]he test for sufficiency is . . . whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint. If [plaintiff] may recover, the motion must be denied."[7]

If, on a 12(b)(6) motion to dismiss, "matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in

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[5] *Deuley v. DynCorp Intl, Inc.*, 588 F. Supp. 2d 539 (D. Del. 2008).

[6] As it happened, this case and *Parlin* were assigned to different judges. Eventually, the court decided it would be efficient to assign the cases to one judge, so this case was reassigned on November 17, 2009.

[7] *Parlin*, 2009 WL 3636756, at *1 (quoting *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

Rule 56[.]"[8] In that instance, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[9]

In limited circumstances, however, "it may be proper for a trial court to decide a motion to dismiss by considering documents referred to in a complaint."[10] "The exception has been used in cases in which the document is integral to a plaintiff's claim and incorporated in the complaint[.]"[11]

Plaintiffs' claims stem from events that took place while decedents and Dickinson were working in Afghanistan. Because the employment agreements are integral to Plaintiffs' claims, they will be incorporated by reference, without converting the motion to dismiss into one for summary judgment.[12]

Additionally, under Superior Court Civil Rule 44.1, "[t]he Court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Delaware Rules of Evidence. The Court's determination shall be treated as a ruling

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[8] *Id* at *2 (quoting Super. Ct. Civ. R. 12(b)(6)).

[9] *Id.*

[10] *Id.* (quoting *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006)).

[11] *Id.* (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995)).

[12] *Id.*

on a question of law."[13] Generally, "the movant will submit enough 'relevant material' to the Court to sufficiently establish the content of foreign law."[14]

Because the foreign law issue, by definition, presents a question of law, the court's consideration of foreign law materials will not convert the motion to dismiss into one for summary judgment. Under Rule 44.1, the court may consider any relevant material, which here includes legal experts' submissions. As explained below, however, the decision does not turn on foreign law because the result is the same under both Delaware and Dubai law.

IV.

Parlin holds that the general release there, which is identical to the one here, was valid under Delaware, Dubai, and United Arab Emirates law.[15] By signing the employment agreement containing the release, Parlin waived his estate's survival claim, thus barring his estate from pursuing it.[16] Parlin's signing the general release, however, did not extinguish his family's wrongful death claim.[17] Accordingly,

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[13] *Id.* (quoting Super. Ct. Civ. R. 44.1).

[14] *Id.* (quoting *Republic of Panama v. Am. Tobacco Co.*, 2006 WL 1933740, at *5 (Del. Super. June 23, 2006) (Cooch, J.)).

[15] *Id* at *3.

[16] *Id* at *5.

[17] *Id.* at *6.

for the same reasons provided in *Parlin,* Deuley's and Gibson's estates are barred from pursuing survival claims, but not from pursuing wrongful death claims. Here, unlike *Parlin,* there is also Dickinson's personal injury claim and his wife's loss of consortium claim.

As Parlin explains, *Jones v Elliott*[18] holds that a "physically injured spouse may not unilaterally extinguish the loss of consortium claim of the other spouse by signing a general release, for the loss of consortium claim is not his to extinguish."[19] Accordingly, like Jones, Dickinson waived his personal injury claim by signing the employment agreement containing the release, but not his wife's loss of consortium claim. The agreement did not purport to release any claims besides Dickinson's, and Kim Dickinson did not sign the agreement or a release. Of course, Kim Dickinson still must "prove the underlying liability of the tortfeasor for the husband's physical injury."[20] As discussed below, that is not reasonably possible.

Parlin also observes that under Dubai law, the release does not apply to the employees' spouses, as they did not sign releases and the releases contain no

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[18] 551 A.2d 62 (Del. 1988).

[19] *Id.* at 64-65 ("This is a claim for a separate and distinct injury resulting from the physical injury to the husband and may be maintained independently if . . . the spouse having the direct claim has unilaterally foreclosed the opportunity to assert the consortium claim.").

[20] *Id* at 65.

reference to the employees' heirs. Additionally, under the UAE Civil Code, nothing indicates that the release extended to the employees' families.[21]

V.

Here, Defendants squarely invoke assumption of the risk as a ground for dismissal. They contend that "[t]he Officers' primary assumption of the risk, along with the valid general release, is a complete bar to recovery." As presented above, Plaintiffs signed employment agreements, stating: "[t]he Employee understands and accepts the fact that he or she will be exposed to dangers due to the nature of the mission." And, the agreements refer to injury and death. Defendants claim that "there can be no dispute that each Officer fully appreciated the risks involved in working in war-torn Afghanistan."

In response, Plaintiffs argue that their "claims do not arise from 'the risk of their profession' but from defendant's negligence and recklessness, which is analyzed differently from more generalized risks." Plaintiffs claim that "[w]hile decedent may have arguably assumed a generalized risk of attack in Afghanistan, there has been no showing (or argument)

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[21] UAE Civil Code Art. 250 (quoted in Legal Op. of Hassan Arab, at 8) ("The effects of the contract shall extend to the contracting parties and their general successors . . . unless it appears from the contract or from the nature of the transaction or from the provisions of the law that the effects were not to extend to a general successor.").

that decedent assumed the risk of defendants' recklessness."

Plaintiffs' argument to the contrary notwithstanding, if the releases amounted to express agreements to assume the risk, by definition, Plaintiffs relieved Defendants of any duty of care. That means Plaintiffs cannot hold Defendants liable for conduct that would otherwise be negligent or reckless.[22]

Accordingly, for purposes of Defendants' motions to dismiss, the court must decide whether the complaint, giving Plaintiffs every reasonable inference, states a claim for wrongful death. Of course, as explained above, that analysis turns on whether it appears from the complaint itself that Plaintiffs undeniably and expressly agreed to assume the risk of IED attack.

Plaintiffs do not deny they knew they were going to work for Defendants in a war zone. The court takes notice that, at a minimum, when Plaintiffs signed the releases, even a poorly informed American had to have appreciated that working in Afghanistan involved the general risk of insurgent or terrorist attacking by an IED. The complaint offers no reason to find that any plaintiff here was probably unaware

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[22] Restatement (Second) of Torts § 496B (1965); *Spencer v. Wal-Mart Stores E., LP*, 930 A.2d 881, 885 (Del. 2007).

of the general risk of being injured or killed by a bomb.[23]

While details about Plaintiffs' specific duties are not included in the complaint, it appears that Plaintiffs' mission was training police officers in Afghanistan. As presented above, Plaintiffs allege that "Dyn-House" was a special target for just the sort of attack they encountered there. Plaintiffs further claim that they actually warned Defendants about the peril, and they complain that their concerns were ignored or dismissed. Thus, Plaintiffs cannot deny that they went to Afghanistan knowing generally of the risk of the harm that befell them. And, while in Afghanistan, their knowledge of the threat became specific.

To refute primary assumption of the risk, Plaintiffs do not suggest that they were unaware that they were going to a place where they might encounter an IED. They attempt to refute their primary assumption of the risk by contending that Defendants were specifically warned that an attack was imminent, but Defendants negligently or recklessly "rejected the use of any additional security measures or changes in procedure[.]" Accordingly, for present purposes, the court assumes that Defendants were negligent, or even reckless, by rejecting additional security measures or

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[23] *Sewell v. Dixie Region Sports Car Club of Am., Inc.*, 451 S.E.2d 489, 490 (Ga. App. 1994) ("[I]n the absence of anything to the contrary, every adult is presumed to possess such ordinary intelligence, judgment, and discretion as will enable him to appreciate obvious danger.").

changes in procedure, as alleged. That assumption, however, does not overcome Plaintiffs' primary assumption of the risk.

When they signed the releases, Plaintiffs may not have known precisely how they might be injured or killed by an IED – through direct enemy action, Defendants' negligence, or a combination, or otherwise – but they undeniably knew that terrorist insurgents in Afghanistan were planting bombs in order to kill Americans.[24] Based on their pleadings and common experience, Plaintiffs cannot deny that they knew they were risking death or injury from IEDs when they signed the releases in return for Defendants agreeing to buy insurance for them and their families.

The court will not hold, as a matter of law, that assuming the risk of going into harm's way only embraces enemy action, and not also the confusion, miscommunication, mistakes and even stupidity associated with war that leads to injury and death. The court holds, as a matter of law, that the "dangers

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[24] *Slowe v. Pike Creek Court Club, Inc.*, 2008 WL 5115035, at *4 n.22 (Del. Super. Dec. 4, 2008) (Ableman, J.) (quoting *McDonough v. Nat'l Off-Road Bicycle Ass'n*, 1997 WL 309503, at *5 (D. Del. June 2, 1997)) ("In an express agreement to assume a risk, a plaintiff may undertake to assume all risks of a particular situation, whether they are known or unknown to him."); *see also Madison v. Superior Court (Sulejmanagic)*, 250 Cal. Rptr. 299, 306 (Cal. Ct. App. 1988) ("[B]y express agreement a 'plaintiff may undertake to assume all of the risks of a particular . . . situation, whether they are known or unknown to him.'").

due to the nature of the mission," which Plaintiffs expressly agreed to assume, included everything involving IEDs.

VI.

Having decided that Plaintiffs expressly assumed the risk of the harm that caused their deaths, the court must finally consider whether that knocks out the wrongful death claims. As explained in *Parlin* and above, it is settled that wrongful death claims are derivative. Unless the decedent was subject to a tort, the next-of-kin cannot maintain wrongful death claims. By agreeing to assume the risk of the harm that ultimately caused their deaths, Plaintiffs gave Defendants a complete defense. Defendants owed Plaintiffs no duty of care as to the assumed risk.[25] It follows that the survivors cannot impose liability on Defendants where Defendants had no liability to the decedents. The same is true for the loss of consortium claim.

The cases on the relationship between a decedent's primary assumption of the risk and his survivor's wrongful death claim are scant. There is, however, a helpful opinion from California. In *Madison v. Superior Court (Sulejmanagic)*[26], decedent signed a waiver

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[25] *Koutoufaris v. Dick*, 604 A.2d 390, 397 (Del. 1992) (explaining that primary assumption of risk "relieves the defendant from all legal duty")

[26] 250 Cal. Rptr. 299 (Cal. Ct. App. 1988).

and release in favor of the providers of a scuba diving training course. Decedent died because of the providers' presumptive negligence. *Madison* held that the release could not limit the survivors' right to prosecute their wrongful death action, but the decedent assumed the risk of injury and thereby relieved the providers of any duty to him. Accordingly, the providers had a complete defense to the decedent's tort claim, and that extinguished his survivors' wrongful death claim.

Madison is also helpful because it examined the quality of the waiver and release there. The waiver and release in *Madison* was more explicit than the ones signed by Plaintiffs here. The waiver and release in *Madison* boldly stated that it covered "liability for personal injury, . . . or wrongful death caused by negligence."[27] Whereas, the waiver and release here speaks of injury or death associated with the dangers of the mission. *Madison,* however, did not turn on the waiver and release's specificity. It turned on what it was that the decedent waived.

The pivotal issue there was whether the decedent "clearly accepted responsibility for the consequences of any act of negligence by defendants."[28] Because the appellate court in *Madison* was satisfied that decedent accepted responsibility, it concluded that whether decedent knew the specifics about the risk of harm

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[27] *Id.* at 302.

[28] *Id.* at 306.

was "irrelevant."[29] *Madison* held where decedent assumed all risk, "the law imposes no requirement that [decedent] have had a specific knowledge of the particular risk which resulted in his death."[30]

Here, decedents accepted responsibility for all risks of injury and death associated with the dangers of their mission in Afghanistan, including the threat of IEDs. Decedents were killed by an IED. Accordingly, the particulars about what lead up to the fatal explosion cannot give rise to a claim.

In closing, the court acknowledges that it is unusual to grant dismissal in a tort case. Even so, discovery cannot materially improve Plaintiffs' position here. The court has assumed that Defendants' negligence was a proximate cause of Plaintiffs' injuries and deaths. Plaintiffs failure to state a claim turns on the contracts that the decedents and Dickinson signed. Even when those contracts are viewed in the context set-out in the complaint, they unassailably reflect assumption of the risk of injury and death from an IED. Thus, as explained above, as a matter of law, Defendants cannot be held liable in tort for the decedents' injuries and deaths.

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[29] *Id.* at 306-07.

[30] *Id.* at 306.

VII.

For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
Robert K. Beste, III, Esquire
Neilli Mullen Walsh, Esquire

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CYNTHIA PARLIN, Individually, and in her Capacities as Surviving Spouse of Samuel Parlin, And As Executrix of the Estate of Samuel Parlin, Deceased,	)	
Plaintiffs,	)	
v.	)	C.A. No.: 08C-01-136-FSS
DYNCORP INTERNATIONAL, INCORPORATED, a Delaware Corporation, Parent of the co-defendant DYNCORP entities, formerly known as DI Acquisition Corporation; DYNCORP INTERNATIONAL LLC, a Delaware Limited Liability Corporation; and DOE ENTITIES 1-10,	)	**E-FILED**
Defendants.	)	

Submitted: June 2, 2009
Decided: September 30, 2009

MEMORANDUM OPINION AND ORDER

On January 16, 2006, Plaintiff-Decedent, Samuel Parlin, was killed by a roadside bomb in Baghdad, Iraq. Parlin, a citizen of the State of Georgia, was employed as an international police liaison officer by non-party, DynCorp International FZ, LLC, a

Dubai company owned by Defendants, DynCorp International, Inc., and DynCorp International LLC. Defendants are Delaware corporations with principal places of business in Virginia and Texas, respectively. On January 16, while Parlin was on his way to a job interview at the direction of Defendants, an improvised explosive device detonated near his vehicle, fatally injuring him.

Before beginning work in Iraq, Parlin signed an employment agreement with DynCorp. The agreement expressly provides that it is governed by the law of the Dubai Internet City. The agreement also describes the general nature and duties of Parlin's job, and further states:

> The Employee understands and accepts the fact that he . . . may be exposed to dangers due to the nature of the mission. The Employee agrees that neither Employer nor its affiliates will be liable in the event of death . . . to Employee, except as stated below. Employer will obtain . . . insurance . . . on behalf of the Employee. The Employee agrees to accept these insurance benefits as full satisfaction of any claim for death, injury or disability against Employer and its affiliates.

DynCorp, as promised, obtained a $250,000 insurance policy for Parlin. After he was killed, Parlin's widow, Cynthia, received the policy's limits. Now, as discussed below, Defendants contend that the employment agreement not only extinguished Parlin's survival claim, but also eliminated Cynthia Parlin's wrongful death claim.

I.

On January 16, 2008, Cynthia Parlin filed claims against Defendants under Delaware's wrongful death[1] and survival[2] statutes. In February 2008, the case was removed to the United States District Court for the District of Delaware. Subsequently, the District Court granted Plaintiffs' Motion for Remand, and the case returned to this court.

On November 11, 2008, Defendants moved to dismiss. As mentioned, Defendants contend that when Parlin agreed to accept the benefits in his employment agreement, he released all claims, by anyone, related to his death. Furthermore, Defendants assert that the agreement is governed by Dubai law. Oral argument was heard on March 6, 2009, and supplemental filings were called for by the court during oral argument, and by order on May 19, 2009. The parties filed supplemental briefs on June 2, 2009.

II.

Under Superior Court Civil Rule 12(b)(6), a case may be dismissed for failure to state a claim upon which relief can be granted. The court must accept all well-pleaded allegations as true, and "[t]he test for sufficiency is . . . whether a plaintiff may recover under any reasonably conceivable set of circumstances

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[1] 110 *Del. C.* §§ 3721-22, 3724-25.

[2] 210 *Del. C.* §§ 3701, 3704.

susceptible of proof under the complaint. If [plaintiff] may recover, the motion must be denied."[3]

If, on a 12(b)(6) motion to dismiss, "matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]"[4] In that instance, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[5]

In limited circumstances, however, "it may be proper for a trial court to decide a motion to dismiss by considering documents referred to in a complaint."[6] "The exception has been used in cases in which the document is integral to a plaintiff's claim and incorporated in the complaint[.]"[7]

Plaintiffs' claims are based upon events that took place while Parlin was working in Baghdad pursuant to his employment agreement. Because of the significant role the agreement plays in this matter, it is integral to Plaintiffs' claims and will be incorporated by reference, without converting the motion to dismiss into one for summary judgment.

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[3] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[4] Super. Ct. Civ. R. 12(b)(6).

[5] *Id.*

[6] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006).

[7] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995).

In addition, under Superior Court Civil Rule 44.1, "[t]he Court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Delaware Rules of Evidence. The Court's determination shall be treated as a ruling on a question of law."[8] Generally, "the movant will submit enough 'relevant material' to the Court to sufficiently establish the content of foreign law."[9]

Because the foreign law issue, by definition, presents a question of law, the court's consideration of materials regarding foreign law will not convert the motion to dismiss into one for summary judgment. Under Rule 44.1, the court may consider any relevant material, which here includes the various legal experts' submissions. As explained below, however, the decision does not turn on foreign law because the result is the same under both Delaware and Dubai law.

III.

First, Defendants argue that the "release" in Parlin's employment agreement is valid under Dubai law, and thus, the claims "brought on behalf of Mr. Parlin must be dismissed for failure to state a claim." Defendants contend that Parlin's employment agreement, by its terms, is governed by Dubai law because

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[8] Super. Ct. Civ. R. 44.1.

[9] *Republic of Panama v. Am. Tobacco Co.*, 2006 WL 1933740, at *5 (Del. Super. June 23, 2006).

of Paragraph 19: "[t]his Contract shall be governed by and interpreted under the laws of the Dubai Internet City." Defendants argue that "Dubai has a 'material relationship' to the events underlying this lawsuit," and that Dubai and United Arab Emirates's overarching laws "are not 'repugnant' to Delaware public policy." Defendants further claim that UAE labor law governs, and the release in Parlin's employment agreement is valid because "the decedent's family was compensated in excess of the statutorily required amount under the UAE Labor Law[.]"

In the alternative, Defendants contend that the release in Parlin's employment agreement is valid under Delaware law and under the federal Defense Base Act,[10] which limits certain releases. Defendants further submit that, due to the release, Cynthia Parlin "cannot bring any actions that would be derived from the decedent's claims . . . against Defendant based upon the wrongful death or survival statutes."

In response, Plaintiffs assert that Cynthia Parlin was not a party to the release, and that "a claim for wrongful death is an independent action maintained for the benefit of the loved one, not the decedent, and as such cannot be released by only the decedent." Additionally, Plaintiffs argue that "defendants have made no clear showing of the propriety of applying Dubai law," and that no choice of law analysis is necessary because Defendants' arguments fail under both Delaware and Dubai law.

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[10] 33 U.S.C. § 915(b).

IV.

"Delaware courts will generally honor a contractually-designated choice of law provision so long as the jurisdiction selected bears some material relationship to the transaction."[11] Courts have found that a material relationship exists where a party's principal place of business is located within the foreign jurisdiction,[12] a majority of the activity underlying the action occurred within the foreign jurisdiction,[13] and where parties to a contract performed most of their services in the foreign state.[14] Furthermore, a foreign jurisdiction's laws may not be used to interpret a contractual provision "in a manner repugnant to the public policy of Delaware[.]"[15]

Parlin's employment agreement plainly states that Dubai law governs the contract. While Dubai

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[11] *J.S. Alberici Constr. Co. v. Mid West Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000); *Annan v. Wilmington Trust Co.*, 559 A.2d 1289, 1293 (Del. 1989).

[12] *Maloney-Refaie v. Bridge at Sch., Inc.*, 2008 WL 2679792, at *4 n.16 (Del. Ch. July 9, 2008); *Shadewell Grove IP, LLC v. Mrs. Fields Franchising, LLC*, 2006 WL 1375106, at *7 (Del. Ch. May 8, 2006); *Hills Stores Co. v. Bozic*, 769 A.2d 88, 112 (Del. Ch. 2000).

[13] *E.I. du Pont de Nemours & Co. v. Bayer CropScience L.P.*, 958 A.2d 245, 249 n.9 (Del. Ch. 2008).

[14] *Bozic*, 769 A.2d at 112. *See also Knight v. Caremark Rx, Inc.*, 2007 WL 143099, at *5 n.14 (Del. Ch. Jan. 12, 2007) ("Alabama clearly satisfies this test because the claims and counterclaims that the Settlement Agreement resolved were pending in its state courts.").

[15] *J.S. Alberici Constr. Co.*, 750 A.2d at 520.

arguably does not have a strong material relationship to this action – Parlin was from Georgia, Defendants are Delaware corporations, and Parlin's employment and death were in Baghdad – Dubai's relationship to the case is similar to Delaware's. Regardless, as explained below, the result is the same under both Delaware and Dubai law. Thus, "the Court may resolve the dispute without a choice between the laws of the competing jurisdictions."[16]

Furthermore, Defendants represent that "UAE Labor Law provides an exclusive remedy that prescribes the payment of a certain amount of damages in the event of an employee's injury or death without regard to negligence." Nevertheless, both parties' experts, notably Defendants', opined that Cynthia Parlin would be entitled to bring an action in tort under Article 282 of the Civil Code.[17] Thus, it does not

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[16] *Lagrone v. Am. Mortell Corp.*, 2008 WL 4152677, at *5 (Del. Super. Sept. 4, 2008); *see also Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006) ("According to conflicts of law principles, where the laws of the two jurisdictions would produce the same result on the particular issue presented, there is a 'false conflict,' and the Court should avoid the choice-of-law question."). *Cf. Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991) (generally, Delaware courts use the "most significant relationship test" when a choice of law analysis is necessary).

[17] First Decl. of Omar Al Shaikh, at 5 ¶ H ("The waiver provision does not prevent the employee or his family from filing a claim for compensation against the employer on the grounds of negligence under the general law."); First Legal Op. of Hassan Arab, at 2-3 ("A claim could be brought by Mrs. Parlin for general compensation under the Civil Code for negligence pursuant

(Continued on following page)

appear that the statutory amount of damages allowed under UAE labor law is the exclusive remedy for Cynthia Parlin.

V.

Delaware courts recognize the validity of general releases.[18] "Where the release is clear and unambiguous, it only will be set aside where there is fraud, duress, coercion, or mutual mistake concerning the existence of a party's injuries."[19]

As presented above, the employment agreement states that Parlin "agrees that neither Employer nor its affiliates will be liable in the event of death" and that "[t]he Employee agrees to accept [the] insurance benefits as full satisfaction of any claim for death . . . against Employer and its affiliates." It appears that Parlin clearly and unambiguously waived his claims, and there are no allegations of fraud, duress, coercion, or mistake. Thus, the release is valid under Delaware law.

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to Article 282 of the Civil Code."); Op. of Samir A. Salloum, at 11 ("[A] claim could be brought by Mrs. Cynthia Parlin for compensation as per Article 282 of the UAE Civil Transactions Law, and in order to be eligible for compensation, Mrs. Cynthia Parlin will have to establish the negligence/default of the Defendants that caused the death of Mr. Samuel Parlin.").

[18] *Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 985 (Del. 1981); *Cunningham v. Walter*, 1998 WL 473007, at *2 (Del. Super. April 2, 1998).

[19] *Edge of the Woods, Ltd. P'ship v. Wilmington Sav. Fund Soc'y, FSB*, 2000 WL 305448, at *4 (Del. Super. Feb. 7, 2000).

Additionally, based upon the declaration of Omar Al Shaikh, a Dubai attorney specializing in UAE labor law:

> [I]n order for [the general release] to be valid where an employee has died as a result of an accident at work[,] the employer is required to pay the employee's family (as defined in Article 149) a one time lump sum payment equal to his basic remuneration for 24 months, provided that the amount of the compensation is not less than AED 18,000 (USD $4,904.63) nor greater than AED 35,000 (USD $9,536.78).[20]

Al Shaikh further opines that "the maximum amount is the most the employer would be statutorily required to pay under the UAE Labor Law. However[,] the law does not prevent an employer from paying more than AED 35,000."[21]

For the release to be valid, the statutory amount owed to Parlin's family was approximately USD $86,627.28, which could be paid under an insurance policy.[22] Cynthia Parlin received $250,000.00 from the insurance policy issued on Parlin's behalf. Because this amount exceeded $86,627.28, the release appears valid.

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[20] First Decl. of Omar Al Shaikh, at 4 ¶ F.

[21] *Id.*

[22] *Id.* at 4-5 ¶ G.

Furthermore, Hassan Arab, partner of a Dubai law firm, opined that the release is valid not only under UAE labor law, but also under the Civil Code. Article 296 of the Civil Code states that "[a]ny condition purporting to provide exemption from liability for a harmful act shall be void."[23] The release nevertheless appears valid, even under Article 296, because Parlin's employment agreement did not purport to provide an exemption from liability. Rather, it merely provided an insurance policy in lieu of Parlin's right to sue his employer for his death or injury.

Finally, Defendants contend that "the general release contained in Mr. Parlin's employment agreement is valid under the Defense Base Act." Thirty-three U.S.C. § 915(b) provides: "[n]o agreement by an employee to waive his right to compensation under this chapter shall be valid."

Parlin's employment agreement was not, however, a waiver of compensation under the Defense Base Act. The release did not require forfeiture of Defense Base Act benefits.[24] Instead, the release was simply a waiver of his right to sue Defendants in exchange for insurance benefits. Therefore, even under the Defense Base Act, Parlin's release is valid. Assuming the release is enforceable, the dispositive issue is whether it barred Parlin's estate's survival claim or Cynthia Parlin's wrongful death claim.

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[23] First Decl. of Charles S. Laubach, at 5 ¶ 12.

[24] It is suggested that Parlin's family receives benefits under the Act.

VI.

A. Survival Claim

Under Delaware's survival statute, a decedent's estate has a cause of action against a defendant for "the prosecution of claims on behalf of [the] deceased."[25] "A survival action, filed by the personal representative of the estate, recovers any damage sustained by the decedent between the injury and his/her death, for which the decedent could have recovered had he/she lived."[26] Recoverable damages under the statute are "pain and suffering from the time of injury to the time of death, expenses incurred in endeavoring to be cured of such injuries and loss of earnings resulting from such injuries from time of injury to time of death."[27]

By signing the employment agreement containing the release, Parlin waived his estate's survival claim. As mentioned, the agreement stated that

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[25] *Pipher v. Burr*, 1998 WL 110135, at *2 (Del. Super. Jan. 29, 1998); 10 *Del. C.* § 3701.

[26] *Franz v. U.S.*, 791 F. Supp. 445, 448 (D. Del. 1992). *See also Bennett v. Andree*, 252 A.2d 100, 103 (Del. 1969) (holding that "an administratrix has the same cause of action the deceased had prior to [his] death"); *Coulson v. Shirks Motor Express Corp.*, 107 A.2d 922, 925 (Del. 1954) ("The result of this amendment has not been the creation of a new cause of action, but rather the continuance in the executor or administrator of a deceased of the same right of action which accrued to the deceased during his lifetime because of the negligent act of the defendant.").

[27] *Pipher*, 1998 WL 110135, at *3.

Parlin "agree[d] to accept [the] insurance benefits as full satisfaction of any claim for death . . . against Employer and its affiliates." Because Parlin waived his right to sue Defendants for his injuries and death, his estate is barred from pursuing the survival claim.

B. Wrongful Death Claim

As explained above, Parlin's release knocks out his survival claim. That holding, however, leaves open the question of whether Parlin's release also knocks out Cynthia Parlin's claim, as next-of-kin, for relief under Delaware's wrongful death statute. Whether Cynthia Parlin has a wrongful death claim turns on how Delaware law treats the deceased's putative release of her statutory claim. That is an open question.

Defendants' argument begins with a truism: wrongful death claims are "derivative." From that, Defendants conclude in bootstrap fashion that because Parlin signed a release knocking out his own tort claim against Defendants, *ipso facto* the release knocked out his next-of-kin's "derivative" claim. In other words, Defendants say that if, for any reason, Parlin cannot sue them for his death, no one else can. Now, the court will consider the implications of a wrongful death claim's derivative nature in this case's context.

Delaware courts have repeatedly held that if a decedent's estate fails to sue the tortfeasor before the statute of limitations has run, any wrongful death

claim is also time barred. *Drake v. St. Francis Hospital*[28] holds that "the statutory right of action created by the Delaware wrongful death statute has *always* been a separate and different right of action than that held by the deceased. Nevertheless, in this jurisdiction, it has been 'held subject to the same [infirmities] as would have existed in a suit by the deceased if still alive.'"[29] *Drake*, as well as *Reyes v. Kent General Hospital*,[30] and *Milford Memorial Hospital, Inc. v. Elliott*,[31] hold that wrongful death claims are barred if decedent allowed the statute of limitations to lapse before dying.

Defendants read too much into *Drake* and its progeny. The *Drake* line of cases stands for the proposition that, as to wrongful death claims, the statute of limitations on a decedent's claim works as a statute of repose, not only extinguishing decedent's primary claim, but also any derivative claim. The subtext to

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[28] 560 A.2d 1059 (Del. 1989).

[29] *Id.* at 1062. *See also Reyes v. Kent Gen. Hosp., Inc.*, 487 A.2d 1142, 1146 (Del. 1984); *Milford Mem'l Hosp., Inc. v. Elliott*, 210 A.2d 858, 860 (Del. 1965). *See also Lovett v. Chenney*, 2007 WL 687228, at *3 (Del. Super. March 2, 2007), *aff'd*, 2008 WL 4483736 (Del. Supr. Oct. 7, 2008) (holding that, because decedent's remedies were limited to the Workers' Compensation Act, his estate could not maintain a tort action against his employer); *Young v. Allstate Ins. Co.*, 1990 WL 63959, at *2-3 (Del. Super. Feb. 26, 1990) (holding that wrongful death claims were barred because an exclusion in decedent's insurance policy would stand as an infirmity to decedent had he survived and filed suit).

[30] 487 A.2d at 1145-46.

[31] 210 A.2d at 860-61.

Drake is the concern that the derivative claimants are not given special treatment, such as extra time in which to file suit.

In contrast to the *Drake* line of cases, *Jones v. Elliott*[32] holds that, where a husband unilaterally releases his primary personal injury claim following a motor vehicle accident, his wife is not bound by the release and may still pursue a loss of consortium claim.[33] While *Jones* was not a wrongful death case, loss of consortium claims, like wrongful death claims, are derivative.[34] *Jones* explains:

> The husband is the holder of the primary cause of action for physical injury against the tortfeasor, and thus only he can extinguish his right to such claim. On the other hand, the wife is the holder of the derivative claim for loss of consortium. This is a claim for a separate and distinct injury resulting from the physical injury to the husband and may be maintained independently, if, as occurred here, the spouse having the direct

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[32] 551 A.2d 62 (Del. 1988).

[33] *Id.* at 63, 65. *Cf. Sobolewski v. German*, 127 A. 49, 52 (Del. Super. 1924) (holding that "[i]t being apparent that no action based on loss of consortium or damage to property could have been brought by the deceased, consequently, no such action can be maintained by the wife").

[34] *See, e.g., Bejger v. Shreeve*, 1997 WL 524057, at *3 (Del. Super. April 15, 1997); *Thompson v. DuPont De Nemours, Rockford Ctr.*, 1991 WL 166122, at *1 (Del. Super. July 31, 1991).

> claim has unilaterally foreclosed the opportunity to assert the consortium claim.[35]

Of course, "the physically injured spouse must have a valid claim in order for the loss of consortium claim to spring into existence."[36]

After *Jones*, in *Spadaro v. Abex Corporation*,[37] this court dealt with an issue similar to the one at hand. *Spadaro* involved wrongful death actions filed by a decedent's wife and two sons. Before his death, decedent and his spouse signed a release on their behalf and on behalf of their "heirs, executors, administrators, successors and assigns" that waived all claims against defendants.[38] While the court dismissed the spouse's wrongful death claim, *Spadaro* held that "since [the sons] had the power to contract for themselves, their parents did not have the power to contract for them."[39] Thus, because the sons did not sign the waiver, the court denied summary judgement for defendants on the sons' wrongful death claims. *Spadaro* explains:

> In Delaware, a wrongful death action is maintained for the benefit of the loved ones of the decedent and not for the benefit of the estate. Therefore, although a wrongful death

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[35] *Jones*, 551 A.2d at 65.

[36] *Id.* at 64.

[37] 1993 WL 603378 (Del. Super. Sept. 9, 1993).

[38] *Id.* at *1.

[39] *Id.* at *2.

> claim is a derivative claim, this does not mean that a release of the underlying claim automatically releases the tortfeasor from wrongful death and loss of consortium claims.[40]

In the instant case, while Parlin signed the employment agreement containing the release, the agreement does not purport to release any claims besides Parlin's. More importantly, Cynthia Parlin did not sign the agreement or a release. The sense of justice[41] that saved the loss of consortium claim in *Jones* is at least as compelling in the wrongful death context. If a husband cannot unilaterally extinguish his wife's loss of consortium claim, he should not be able to unilaterally extinguish his next-of-kin's wrongful death claim.

As *Jones* explains, "[t]here is a difference between the right to extinguish a primary cause of action and the right to extinguish a derivative cause of action."[42] A release, signed only by the decedent and that fails to reference decedent's heirs, is not the type

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[40] *Id.* at *1. *Cf. Perry v. Philadelphia, B. & W. R. Co.*, 77 A. 725, 735 (Del. Super. 1910) (holding that "such right of action is dependent upon the right of the party injured, had he not died in consequence of his injuries, to maintain his action for personal injuries"); *but see Spadaro v. Abex Corp.*, 1994 WL 713840, at *1 (Del. Super. July 20, 1994) ("The *Perry* case, however, was decided under a prior version of the wrongful death act[.]").

[41] *Jones*, 551 A.2d at 65 ("[J]ustice requires that the wife's claim not be foreclosed by the husband's unilateral action.").

[42] *Id.*

of "infirmity" spoken of by the courts in these cases, such as the tolling of the statute of limitations.

It is one thing for the victim of a tort to choose not to sue the tortfeasor, as in *Drake, et al.*, or for Parlin to have agreed with Defendants to waive his claims in return for insurance, as he did. It is something else for Defendants to send Parlin into a war zone without obtaining a waiver from his next-of-kin. The court cannot identify a legitimate reason why Parlin was inherently vested with authority to waive anyone else's rights besides his own. The fact that the family's claim is "derivative" only means that it begins with and flows from an actual tort against the deceased. Therefore, the waiver here simply extinguishes Parlin's claim. It does not vaporize Defendants' allegedly tortious behavior. Absent their victims' waivers, Defendants must answer to those whom Defendants have wronged. In short, Parlin's general release did not extinguish his family's wrongful death claim.

Of course, Plaintiffs will have to prove liability to recover.[43] After discovery, Defendants have leave to move for summary judgment if they can show, viewing the evidence in the proper light, that even if Parlin had not signed a release, he still could not have recovered in tort. Defendants contend that "under Delaware law, Mr. Parlin's primary assumption of the risk 'constitute[s] a complete bar to recovery, as a

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[43] *Id.*

matter of law, even in a comparative negligence jurisdiction[,]' such as Delaware."[44] At this early stage, however, this issue is not ripe.

C. Dubai Law and UAE Civil Code

Finally, based upon the court's limited knowledge of Dubai and UAE law, and the contradictory expert opinions submitted by the parties, it appears that under Dubai law, the release does not apply to Cynthia Parlin. Simply put, she did not sign the release and the release contains no reference to Parlin's heirs. Even under the UAE Civil Code, nothing indicates that the release extended to Parlin's widow or any other family member.[45]

Regardless, the applicability of Dubai or UAE law to the wrongful death claim is not dispositive, as the wrongful death claim arises through Delaware law. In other words, the validity of a release of claims under Delaware's wrongful death statute presents a question of Delaware law.

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[44] *See Spencer v. Wal-Mart Stores East, LP*, 930 A.2d 881, 885-86 (Del. 2007).

[45] UAE Civil Code Art. 250 (quoted in Second Legal Op. of Hassan Arab, at 9) ("The effects of the contract shall extend to the contracting parties and their general successors . . . unless it appears from the contract or from the nature of the transaction or from the provisions of the law that the effects were not to extend to a general successor."); cf. Art. 252 (quoted in Op. of Samir A. Salloum, at 14) ("a contract shall not impose an obligation upon a third party but may create a right in his favor").

In sum, under Delaware and Dubai law, the release in Parlin's employment agreement is valid. Thus, his estate's survival claim is extinguished. Cynthia Parlin's wrongful death claim, however, is not barred because Parlin's unilateral release did not extend to his widow's claim.

VII.

For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED** as to the deceased's survival claim, and **DENIED** as to Cynthia Parlin's wrongful death claim.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary